Supreme Court, U.S.
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No. 91-1299

In The

Supreme Court of the United States

FRANK C. RUSCITTO,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, preserves the traditional equitable authority of a district court to issue preliminary injunctive relief to prevent the infliction of irreparable harm and to maintain the status quo pending arbitration?

2. Whether the district court and Fifth Circuit United States Court of Appeals correctly followed the mandate of Sections 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 3-4, requiring that parties "proceed to arbitration in accordance with the terms of the [arbitration] agreement", by rejecting petitioner's motion to order arbitration under judicially imposed terms entirely contrary to the parties' arbitration agreement?

LIST OF INTERESTED PARTIES

This Rule 29.1 listing includes Merrill Lynch, Pierce, Fenner & Smith, Inc.'s parent, wholly and nonwholly owned subsidiaries and related companies.

Merrill Lynch & Co., Inc.

Broadcort Capital Corp.

Jersey Hudson Tenant, Inc.

Merrill Lynch & Co., Canada Ltd.

Merrill Lynch Canada Incorporated/Incorporee

Merrill Lynch Life Agency Inc. (1)

Merrill Lynch Princeton Incorporated

R.O.C. Denver, Inc.

R.O.C. Florida, Inc.

R.O.C. Texas, Inc.

Wagner Stott Clearing Corp.

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* Merrill Lynch, Pierce, Fenner & Smith, Inc. also has 13 other subsidiaries that are engaged in business as life insurance agencies for the sale of life insurance and annuity products. Additional information on these companies will be provided if necessary for conflict purposes.

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No. 91-1299

In The

Supreme Court of the United States

October Term, 1991

FRANK C. RUSCITTO,

Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 11, 1991.

STATUTE INVOLVED

The petition involves Sections 3 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3-4, both of which sections are set forth in the petition. (*See* Petition at pp. 2-3).

COUNTERSTATEMENT OF THE CASE

This case arose on or before July 3, 1991 when petitioner, a former financial consultant in Merrill Lynch's Las Colinas, Texas branch office, accepted financial inducements of approximately $300,000 from PaineWebber, Inc., a competitor of Merrill Lynch, and, in consideration thereof, (a) resigned without notice from Merrill Lynch; (b) copied confidential and trade secret Merrill Lynch records; (c) solicited Merrill Lynch accounts; and otherwise conspired with PaineWebber to divert the patronage of Merrill Lynch accounts to PaineWebber. (*See* Pet. App. A-1; Res. App. 1ra-3ra).

At the time he commenced employment with Merrill Lynch, petitioner signed an employment contract with Merrill Lynch known as an Account Executive Trainee Agreement (the "Agreement") in which petitioner agreed, in relevant part, as follows:

> 1. *All records of Merrill Lynch, including the names and addresses of its clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination of my employment for any reason with Merrill Lynch. None of said records nor any part of them is to be removed by me from the premises of Merrill Lynch either in original form or in duplicated or copied form,* and the names, addresses, and other facts in such records are not to be transmitted verbally or in writing by me

> except in the ordinary course of conducting business for Merrill Lynch. All of said records or any part of them are the sole proprietary information of Merrill Lynch and shall be treated by me as confidential information of Merrill Lynch.
>
> 2. In the event of termination of my services with Merrill Lynch for any reason, *I will not solicit, for a period of one year from the date of termination of my employment* in any community or city served by the office of Merrill Lynch, or any subsidiary thereof, at which I was employed at any time, *any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch.*

(*See* Pet. App. A-2-A-3; Res. App. 1ra-4ra, 10ra-11ra).

On July 3, 1991, within less than two hours after his resignation from Merrill Lynch, petitioner filed pleadings in the United States District Court for the Northern District of Texas consisting of, *inter alia,* a complaint, an affidavit signed by petitioner, and a motion for a temporary restraining order seeking to enjoin Merrill Lynch from requesting any federal or state court for preliminary injunctive relief to prevent petitioner's breaches pending arbitration before the New York Stock Exchange, Inc.

In his affidavit, petitioner admitted that, after resigning from Merrill Lynch, and in violation of paragraph 2 of his Agreement, he sent a solicitation mailing to the clients he formerly serviced at Merrill Lynch. Petitioner also admitted in his affidavit that, in violation of paragraph 1 of his Agreement, he had previously confiscated and delivered to PaineWebber confidential Merrill Lynch customer records and client lists.

On July 8, 1991, Merrill Lynch filed a cross-motion for a temporary restraining order and a preliminary injunction with the district court. In its cross-motion, Merrill Lynch specifically *agreed* to arbitration before the New York Stock Exchange ("NYSE") in accordance with the NYSE Constitution and Rules, and requested only that the district court issue injunctive relief *pending* arbitration in order to prevent permanent irreparable harm to Merrill Lynch resulting from the diversion of its clients and the misappropriation of its confidential and trade secret customer records and client lists and in order to maintain the status quo pending arbitration.

On August 2, 1991, the district court granted Merrill Lynch's motion for a preliminary injunction pending arbitration. In its memorandum opinion, the district court clearly stated that the purpose and effect of the court's order was to "preserve the status quo" pending an arbitration hearing before the NYSE.[1] (*See* Pet. App. A-5-A-6).

Moreover, because Merrill Lynch had at all times specifically agreed to proceed with arbitration before the New York Stock Exchange, the district court held that there existed no need or legal basis to compel arbitration under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, which requires that the moving party establish a "failure, neglect or refusal" by another party to arbitrate. (*See* 9 U.S.C. § 4; Pet. App. C-1-C-2). Petitioner has at no time filed a motion with the court to suggest that there has been any "failure, neglect or refusal" by Merrill Lynch at any time to arbitrate "in accordance with the terms of the [parties']

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1. As with his appeal to the Fifth Circuit Court of Appeals, petitioner misleadingly claims that the district court enjoined him for "an entire year" (*see* Petition at p. 4); this is a complete misrepresentation of the district court's order. As the district court made abundantly clear in its memorandum order, the injunction was to be effective only "during the process of arbitration" and "to preserve the status quo" pending arbitration. (*See* Pet. App. A-5-A-6).

agreement" to arbitrate. (*See* 9 U.S.C. § 4.)[2]

On November 11, 1991, the United States Court of Appeals for the Fifth Circuit, after reviewing the memoranda filed by petitioner and after hearing oral argument, fully affirmed the district court's order granting injunctive relief to prevent irreparable harm to Merrill Lynch and to preserve the status quo pending arbitration. (Pet. App. A). In affirming, the Fifth Circuit followed the uniform decisions of eight other United States Circuit Courts of Appeal and ruled that the district court's preliminary injunction order was based on "well-settled principles of law." *Id.*

SUMMARY OF REASONS FOR DENYING THE WRIT

There are no special or important reasons for granting certiorari in this case, both because the decisions below were squarely in accord with the statutory language and intent of the FAA and because there is no genuine conflict among the United States Circuit Courts of Appeal over the "questions" raised by the petition.

Prior to the decision of the Fifth Circuit in this proceeding, eight United States Courts of Appeal had written thorough and well-reasoned decisions holding that Section 3 of the FAA — which by its terms requires a stay only of the "*trial*" of an arbitrable

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2. There is no support in the record or in fact for petitioner's misleading characterizations that Merrill Lynch has failed to proceed with arbitration in any manner other than in accordance with its agreement to arbitrate; petitioner has never filed a motion or argued to the district court anything to suggest otherwise. In fact, the record establishes that petitioner, in an apparent attempt both to preserve his position and to distort his claims for appeals purposes, has deliberately resisted proceeding with arbitration hearings that were available beginning as early as July 31, 1991 and has continued to resist participating in arbitration hearings up to the present time.

dispute — reserves to courts the authority vested in them, for over 200 years, to issue preliminary injunctive relief, where appropriate, in order to prevent irreparable harm and also to further the purpose of the FAA by protecting parties to an arbitration agreement from one party's unilateral infliction of irreparable harm and irreversible destruction of the status quo pending an arbitration hearing. These many decisions are well-settled and harmonious. They have drawn no contradiction or criticism in any court for a period of over eight years. Like the eight circuit court decisions preceding it, the Fifth Circuit decision below is not noteworthy or controversial in its own right, it is not contradictory or in conflict with prior circuit decisions, and it requires no review either independently or in concert with other prior rulings.

Similarly, the decision below properly followed the mandate of FAA § 4 by allowing the parties "to proceed to arbitration in accordance with the terms of the agreement" to arbitrate and by declining to judicially require the parties to alter the terms of their agreement. In sum, the statutory interpretations advanced by the petitioner are completely contradicted by the plain and unambiguous language of FAA §§ 3 and 4; have no basis in law or in any recognized method of statutory construction; and have been uniformly and properly rejected by *every* circuit, district and state court since 1985 and before. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I.

FAA § 3 AUTHORIZES AND REQUIRES PRELIMINARY INJUNCTIVE RELIEF PENDING ARBITRATION WHERE APPROPRIATE TO PREVENT IRREPARABLE HARM AND TO PROTECT THE INTEGRITY OF THE ARBITRATION PROCESS.

Petitioner's attempt to persuade this Court that a district court's equitable authority to issue preliminary injunctive relief in an arbitrable dispute is a source of "confusion" and "conflict" is overwhelmingly contradicted by over 8 years of uniform decisions in the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuit Courts of Appeal, and in well over 70 federal district courts, that have expressly held that FAA § 3 specifically preserves and endorses the judiciary's longstanding authority of over 200 years to issue preliminary injunctive relief to preserve the status quo and to prevent irreparable harm pending arbitration. These courts have not only recognized that FAA § 3 left intact the judiciary's age-old equitable authority, but also that the issuance of preliminary injunctive relief pending arbitration promotes the goal of the FAA to ensure the "meaningfulness of the arbitration", to prevent arbitration from being rendered a "hollow formality", and to prevent a party from "deliberately and irreversibly altering the status quo" or "eviscerating" another party's rights pending arbitration.

As petitioner recognizes, FAA § 3 "is the single congressional statute upon which the courts must rely" in considering this petition, and "the question of whether [a] statutory right may be waived depends upon the intention of Congress as manifested in the particular statute." (*See* Petition at p. 11). In this case, FAA § 3 simply provides that where the parties before the court

have an agreement to arbitrate, then the court shall "stay the *trial* of the action until such arbitration has been had in accordance with the terms of the agreement . . .". *See* 9 U.S.C. § 3. FAA § 3 does not, as petitioner contends, require a stay of *all proceedings* but, instead, is specifically limited in its scope to a stay of the trial, and clearly contemplates cooperation between the courts and the arbitration process to ensure that the meaningfulness of arbitration is not eviscerated by the unilateral pre-arbitration acts of one party.

Applying the plain and unambiguous language of FAA § 3, nine United States Circuit Courts of Appeal, including the Fifth Circuit in this case, have held that the issuance of preliminary injunctive relief pending arbitration is not only appropriate, but necessary, under FAA § 3 in order to ensure that the parties' ultimate "trial" in arbitration is not robbed of its integrity by one party's infliction of irreparable harm and destruction of the status quo pending arbitration. This is the express holding of the First, Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuit United States Courts of Appeal. *See Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990); *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, 882 F.2d 806 (3d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985); *Sauer-Getribe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983), *cert. denied*, 764 U.S. 1070 (1984); *PMS Distributing Company, Inc. v. Huber*, 863 F.2d 639 (9th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726 (10th Cir. 1988); *Yeargin Construction Co. v. Pearsons & Whitemore Alabama Mach. & Services Corp.*, 609 F.2d 829 (11th Cir. 1980); *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589 (8th Cir. 1984).

In *Merrill Lynch v. Bradley,*[3] for example, the Fourth Circuit Court of Appeals affirmed the district court's authority to grant preliminary injunctive relief pending arbitration under FAA § 3, emphasizing both that FAA § 3 contains no language "stripping the federal judiciary of its equitable powers", and that a contrary interpretation of FAA § 3 would threaten the very meaningfulness of the arbitration process itself:

> We do not believe that Congress would have enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial disputes without undertaking a comprehensive discussion and evaluation of the statute's effect.
>
> * * *
>
> . . . [W]e hold that where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a "hollow formality." The arbitration process would be a hollow formality where "the arbitral award when rendered could not return the parties to the *status quo ante*" [citation omitted]. The instant case is just such a case.

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3. The facts in *Merrill Lynch v. Bradley* were virtually identical to those presented to the district court in this case, and likewise involved a former Merrill Lynch broker who had a similar employment agreement with the same post-employment restrictive covenants, and who also breached these obligations at or about the time of his resignation to join a competitor. *Merrill Lynch v. Bradley, supra,* 756 at F.2d at 1050-51.

* * *

> When an account executive breaches his employment contract by soliciting his former employer's customers, a nonsolicitation clause requires immediate application to have any effect. An injunction even a few days after solicitation has begun is unsatisfactory because the damage is done. The customers cannot be "unsolicited". It may be impossible for the arbitral award to return the parties substantially to the status quo ante because the prevailing party's damages may be too speculative.

* * *

> Furthermore, we do not believe that Congress intended § 3 to tie a district court's hands while one party, pending the arbitration of the parties' dispute, deliberately and irreversibly altered the status quo and thereby deprived the other party of a meaningful arbitration process.

Merrill Lynch v. Bradley, supra, 756 F.2d at 1052-54.

In reaching the conclusion that FAA § 3 preserves the longstanding and fundamental right of an aggrieved party to obtain preliminary injunctive relief pending arbitration, the Fourth Circuit closely examined both the language and the legislative history of FAA § 3, and concluded as follows:

> § 3 [of the Federal Arbitration Act] states only that the court shall stay the "trial of action"; it does not mention preliminary injunctions or other pre-trial proceedings. Certainly Congress knows

> how to draft a statute which addresses all actions within the judicial power.[4] Furthermore, nothing in the statute's legislative history suggests that the word "trial" should be given a meaning other than its common and ordinary usage: the ultimate resolution of the dispute on the merits. *See* Senate Rep. No. 536, 68th Cong., 1st Sess. (1924); H.R.Rep. No. 96, 68th Cong., 1st Sess. (1924).
>
> * * *
>
> We think that our decision will further, not frustrate, the policies underlying the Federal Arbitration Act. In this case preliminary injunctive relief pending arbitration furthers congressional policy by ensuring that the dispute resolution would be a meaningful process because, without such an injunction, Bradley's conduct might irreversibly alter the status quo.

Id. at 1052-54.

In *Blumenthal v. Merrill Lynch,*[5] *supra,* the Second Circuit reached the identical conclusion, holding that preliminary injunctive relief pending arbitration is not only appropriate, but necessary to ensure that the parties receive a "meaningful arbitration" and to prevent arbitration from being rendered a "hollow formality". The Second Circuit similarly engaged in an extensive examination both of the language of FAA § 3 and of

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4. In *Merrill Lynch v. Bradley,* the Fourth Circuit properly recognized the fundamental difference between FAA § 3, which is specifically limited to a stay of the *trial,* from other congressional statutes which require a stay of *all proceedings. Id.* at 1052, n. 3, citing 28 U.S.C. § 2283 and 11 U.S.C. § 362(a)(i).

5. Like *Merrill Lynch v. Bradley,* the facts in *Blumenthal v. Merrill Lynch* were also virtually identical to those established in the proceedings below.

Supreme Court precedents interpreting FAA § 3, before holding as follows:

> [I]n our view, the pro-arbitration policies reflected in the foregoing Supreme Court decisions are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a "hollow formality" if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute . . . A district court must ensure that the parties get what they bargained for — a meaningful arbitration of the dispute. As the Supreme Court has stated, "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. at 221, 105 S. Ct. at 1242. The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate. *See Teradyne, Inc. v. Mostek Corp.,* 797 F.2d at 51; *Merrill Lynch v. Bradley,* 756 F.2d at 1054. *See also Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235, 251-54, 90 S. Ct. 1583, 1592-94, 26 L. Ed. 2d 199 (1970) (cited in *Roso-Lino*).

Blumenthal v. Merrill Lynch, supra, 910 F.2d at 1053-54.[6]

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6. In its earlier decision in *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co.,* 749 F.2d 124 (2d Cir. 1984), the Second Circuit emphasized that a district court's traditional obligation to apply the test for granting preliminary injunctive relief and to issue such relief to prevent irreparable harm (Cont'd)

Similarly, in *Teradyne, Inc. v. Mostek Corp., supra,* the First Circuit analyzed Supreme Court precedents interpreting FAA § 3 and held as follows:

> We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, ipso facto, the meaningfulness of the arbitration process.

Teradyne v. Mostek Corp., supra, 797 F.2d at 51.

In *Ortho Pharmaceutical Corp. v. Amgen, Inc., supra,* the

(Cont'd)
and to preserve the status quo is not eliminated simply because the case is ultimately subject to arbitration:

> We reverse the denial of the preliminary injunction because it appears, from the record before us, that the district court believed its decision to refer the dispute to arbitration stripped the court of power to grant injunctive relief . . . The fact that a dispute is to be arbitrated, however, does not absolve the court of its obligation to consider the merits of a requested preliminary injunction; the proper course is to determine whether the dispute is "a proper case" for an injunction.

Id. at 125, 127. The Fourth Circuit in *Merrill Lynch v. Bradley* made a similar observation in holding that the denial of injunctive relief, where otherwise appropriate, would offend the FAA § 3 by allowing one party, "pending the arbitration of the parties' dispute, [to] deliberately and irreversibly alter the status quo and thereby deprive the other party of a meaningful arbitration". 756 F.2d at 1054. Accordingly, the Fourth Circuit applied the traditional "four factor" test and granted injunctive relief after finding, in part, that "a nonsolicitation clause requires immediate application to have any effect . . . An injunction even a few days after solicitation has begun is unsatisfactory because the damage is done". *Id.* at 1054-55.

Third Circuit likewise held that the issuance of preliminary injunctive relief pending arbitration is necessary to ensure that the parties receive a "meaningful arbitration":

> After an exhaustive discussion of various circuit and Supreme Court authority, the First Circuit in *Teradyne* summarized the rationale for the majority rule:
>
> > "This approach reinforces rather than detracts from the policy of the Arbitration Act . . . . We believe that the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, ipso facto, the meaningfulness of the arbitration process."
>
> We find this reasoning convincing.

Ortho Pharmaceutical v. Amgen, Inc., supra, 882 F.2d at 812, *quoting Teradyne, supra,* 797 F.2d at 51.

The Third Circuit proceeded to emphasize that a contrary result would allow one party to "eviscerate" another party's rights pending arbitration and would undermine "the congressional desire to enforce agreements into which the parties had entered":

> As the Supreme Court stated in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), the Arbitration Act was "motivated by a congressional desire to enforce agreements into which parties had entered." *Id.* at 220, 105 S.Ct. at 1242 . . .

> Therefore, we do not construe such an agreement as constituting a "waiver" by either party of the right to seek preliminary injunctive relief necessary to prevent one party from unilaterally eviscerating the significance of the agreed-upon procedures.

Id. at 812.

Indeed, FAA § 3's preservation of a district court's fundamental equitable authority to prevent irreparable harm and to preserve the status quo pending arbitration has been recognized not just by nine circuit courts since 1984, but by leading jurists such as Judge Learned Hand nearly 50 years ago. In *Murray Oil Products v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944), for example, Judge Hand, in rejecting the identical argument advanced by petitioner, held that pre-arbitration provisional remedies are fully consistent with and appropriate under FAA § 3:

> The most common reason for arbitration is to substitute the speedy decision of specialists in the field for that of juries and judges; and that is entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do . . . All these things considered, we cannot think that we should import into the section [FAA § 3] a limitation, which language does not demand, which could operate over only a part of the field, and which, so far as we can see, would be as likely to defeat as to aid the purpose of the [Federal Arbitration] act.

Murray Oil Products v. Mitsui & Co., supra, 146 F.2d at 384.

In requesting that the Court grant certiorari despite the well-

reasoned and uniform decisions of nine circuit courts, petitioner relies largely upon the dissent of Justices White and Blackmun to the denial of certiorari in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127 (1985). While it might have been possible to argue in 1985 that there was "conflict" in the courts over whether the judiciary retained the equitable authority to grant preliminary injunctive relief pending arbitration, there currently exists no such conflict and there is, accordingly, no reason for Supreme Court review. Since this Court's denial of certiorari in *Merrill Lynch v. McCollum, supra*, every federal circuit court to consider the issue has uniformly held that FAA § 3 preserves the equitable authority of a district court to prevent irreparable harm and to maintain the status quo pending arbitration through the issuance of preliminary injunctive relief. *See Teradyne, Inc. v. Mostek Corp., supra* (1st Cir. 1986); *Blumenthal v. Merrill Lynch, supra* (2nd Cir. 1990); *Ortho Pharmaceutical v. Amgen, Inc., supra* (3d Cir. 1989); *Ruscitto v. Merrill Lynch, supra* (5th Cir. 1991); *PMS Distributing Co. v. Huber, supra* (9th Cir. 1988); *Merrill Lynch v. Dutton, supra* (10th Cir. 1988). Similarly, no federal district court or state court since 1985 has held that FAA § 3 strips a court of its equitable authority to grant preliminary injunctive relief pending arbitration.[7] In fact, as petitioner is forced to concede, scores of courts have rejected this suggestion. (*See* Petition, Appendix F).

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7. The uniformity among the federal and state courts on this issue is perhaps best illustrated by the 83 cases cited in Appendix F to the Petition. While Petitioner, citing Appendix F, contends that the issue of a district court's authority to grant preliminary injunctive relief "still remains unresolved", *not a single post-1985 decision* listed in Appendix F — whether by a federal court or by a state court — has held that a court is without jurisdiction to issue preliminary injunctive relief pending arbitration. In those rare instances in which injunctive relief has been denied, the court's decision was based on unique factual findings that the moving party had failed to establish all of the traditional prerequisites for preliminary injunctive relief, and not on the unsupported and distorted interpretation of FAA § 3 advanced by petitioner in the petition for certiorari.

Moreover, petitioner's attempt to create the illusion of a "split in the circuits" is also inaccurate and misleading. Indeed, the only two circuits that have *ever* at one time held that FAA § 3 precludes the issuance of preliminary injunctive relief (*see* Petition at pp. 12-13, *citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, No. 83-1480 (10th Cir. 1983) (unpublished order) have subsequently reached the *contrary* conclusion and joined the First, Second, Third, Fourth, Fifth, Seventh, Ninth and Eleventh Circuit Courts of Appeals in holding that FAA § 3 clearly preserves the equitable authority of a district court to issue preliminary injunctive relief in order to prevent irreparable harm and to maintain the status quo in an arbitrable dispute. *See Merrill Lynch v. Dutton, supra*, 844 F.2d at 728 (U.S. Court of Appeals for the Tenth Circuit upheld Merrill Lynch's right to preliminary injunctive relief pending arbitration, expressly adopting the Fourth Circuit's decision in *Merrill Lynch v. Bradley, supra*, the First Circuit's decision in *Teradyne v. Mostek, supra*, and the Seventh Circuit's decision in *Sauer-Getribe KG v. White, supra*); *Ferry-Morse Seed Co v. Food Corp., Inc., supra*, 729 F.2d at 592 (in a case decided after *Hovey*, the United States Court of Appeals for the Eighth Circuit affirmed the district court's preliminary injunction order pending arbitration, holding that "we cannot conclude that the district court erred in its determination that the case was arbitrable and its further determination that without an injunction the efficacy of an eventual order compelling arbitration might be drastically impaired").[8]

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8. It is also significant to note the observation in 1985 by the Fourth Circuit in *Merrill Lynch v. Bradley* that "[i]n *Hovey*, the Eighth Circuit did not mention the language of § 3". *Merrill Lynch v. Bradley, supra*, 756 F.2d at 1052, n. 4. The analysis of the Fourth Circuit in *Merrill Lynch v. Bradley* has since been widely and uniformly adopted, and the 1984 *Hovey* decision has since drawn *no* support, not even in the Eighth Circuit. *See Ferry-Morse Seed Co. v. Food Corn, Inc., supra.*

Accordingly, the rule is now entirely uniform among the federal circuit and district courts, as well as among state courts,[9] that a party who satisfies the necessary prerequisites is entitled to preliminary injunctive relief pending arbitration, and that this rule is the only result consistent with the plain and unambiguous language of FAA § 3. These uniform court rulings also are fully consistent with prior rulings of this Court. For example, while petitioner contends that this Court's holding in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 394 (1976), bars the issuance of preliminary injunctive relief under FAA § 3, that decision actually exposes a fundamental flaw in petitioner's position. In *Buffalo Forge*, the court held only that preliminary injunctive relief pending arbitration was inappropriate under the Norris-LaGuardia Act, an Act which, *unlike* the FAA, contains a specific anti-injunction provision.

In fact, *Buffalo Forge* squarely supports the decision of the Fifth Circuit and eight other United States Courts of Appeal to have resolved this question. In contrast to the Norris-LaGuardia Act under consideration in *Buffalo Forge Co.*, FAA § 3 contains *no* anti-injunction provision and thus evinces Congress' intent not to disturb the longstanding equitable authority of district courts to issue preliminary injunctive relief where appropriate in any given dispute to prevent irreparable harm from occurring. Indeed, Congress' specific inclusion of an anti-injunction provision in the Norris-LaGuardia Act plainly illustrates that Congress is fully

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9. Petitioner cites three state court decisions from Delaware, Louisiana and Texas that are claimed to be contrary to the Fifth Circuit's ruling in this case. (Petition at 16). All three of these decisions were decided in 1985 or earlier and, in a more recent Delaware case, decided with the benefit of the uniform United States Circuit Courts of Appeal decisions cited above, the Delaware Chancery Court specifically agreed that, where necessary to prevent irreparable harm, injunctive relief under FAA § 3 pending arbitration was appropriate. *Merrill Lynch v. Price*, No. 11097, 1989 WL 108412 (Del. Ch. 1989) (Appendix F at Tab 43).

capable of drafting a statute which alters or modifies a district court's equitable authority to issue preliminary injunctive relief in an arbitrable dispute and that, if Congress had intended such a result under the FAA, it would have included the appropriate and necessary language in § 3 of the statute.

This basic rule of statutory construction was applied by the Fourth Circuit Court of Appeals in *Merrill Lynch v. Bradley, supra*, where it easily distinguished *Buffalo Forge* and specifically contrasted the express anti-injunction provision in the Norris-LaGuardia Act with the limited "stay the trial" language of FAA § 3:

> Section 3 does not contain a clear command abrogating the equitable power of district courts to enter preliminary injunctions to preserve the status quo pending arbitration. Instead, § 3 states only that the court shall stay the "trial of action"; it does not mention preliminary injunctions or other pre-trial proceedings. Certainly Congress knows how to draft a statute which addresses all actions within the judicial power [footnote omitted]. Furthermore, nothing in the statute's legislative history suggests that the word "trial" should be given a meaning other than its common and ordinary usage: the ultimate resolution of the dispute on the merits. *See* Senate Rep. No. 536, 68th Cong., 1st Sess. (1924); H.R.Rep. No. 96, 68th Cong., 1st Sess. (1924).
>
> We do not believe that Congress would have enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial

> disputes without undertaking a comprehensive discussion and evaluation of the statute's effect. Accordingly, we conclude that the language of § 3 does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.
>
> * * *
>
> In *Buffalo Forge* the Supreme Court held only that the anti-injunction provision of the Norris-LaGuardia Act precludes a court from granting a preliminary injunction where the labor strike, in violation of a "no strike" clause, did not involve an arbitral dispute. 428 U.S. at 407, 96 S.Ct. at 3147. Neither case, however, directly addressed the issue presented here, namely, whether § 3 of the Federal Arbitration Act absolutely precludes a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.

Merrill Lynch v. Bradley, supra, 756 F.2d at 1052-54.

Similarly, in *Blumenthal v. Merrill Lynch, supra*, the U.S. Court of Appeals for the Second Circuit distinguished the Court's decision in *Buffalo Forge* on this same basis, and held as follows:

> Dicta in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 410-12, 96 S.Ct. 3141, 3148-50, 49 L.Ed.2d 1022 (1976), suggesting that a court's injunction pending arbitration could eviscerate an agreement to arbitrate is inapposite since that case involved application of the explicit anti-injunction

> provision of the Norris-LaGuardia Act in a labor dispute. Indeed, the Supreme Court had earlier created an exception to the anti-injunction provision, found not applicable in *Buffalo Forge*, when an injunction was necessary to enforce an agreement to arbitrate. *Boys Markets, Inc. v. Retail Clerks Union*, 98 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

Blumenthal v. Merrill Lynch, supra, 910 F.2d at 1053, n. 3.

FAA § 3's preservation of a court's equitable authority to issue preliminary injunctive relief in an arbitrable dispute also is entirely consistent with the many decisions of this Court recognizing the federal policy favoring arbitration agreements. In fact, as the nine circuit courts discussed above have all emphasized, allowing a party to inflict irreparable harm and to "deliberately and irreversibly alter the status quo" pending arbitration would completely undermine arbitration as an alternative means of resolving disputes and would deprive parties of exactly what they contracted for in their arbitration agreement; a "meaningful arbitration of their dispute". This was perhaps best articulated by the Second Circuit in *Blumenthal v. Merrill Lynch, supra*, in which the court stated as follows:

> Arbitration can become a "hollow formality" if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute. *See Teradyne, Inc. v. Mostek Corp.*, 797 F.2d at 51; *Merrill Lynch v. Bradley*, 756 F.2d at 1053-54. A district court must ensure that the parties get what they bargained for — a meaningful arbitration of the dispute. As the Supreme Court has stated, "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to

> enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 221, 105 S.Ct. at 1242. The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate. *See Teradyne, Inc. v. Mostek Corp.*, 797 F.2d at 51; *Merrill Lynch v. Bradley*, 756 F.2d at 1054. *See also Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251-54, 90 S.Ct. 1583, 1592-94, 26 L.Ed.2d 199 (1970) (cited in *Roso-Lino*).

Id., 910 F.2d at 1056.

In sum, while the language of FAA § 3 is carefully and precisely limited to a stay of the trial only, and does not suggest any intent to disturb the judiciary's traditional equitable pre-trial powers, petitioner would have the Court profoundly extend and distort the limited statutory language to include an absolute stay of *all proceedings* and "pre-trial matters" or, more accurately, an outright repeal of federal jurisdiction of any kind. Petitioner's position finds no support in the plain and unambiguous language of FAA § 3; no support under any theory of statutory construction; no support under any precedent set in any Circuit Court of Appeals or in any district or state court decision rendered since 1985;[10] and no support under any legal or practical framework for preserving what may often be the only meaningful legal remedy available to preserve the integrity of the arbitration process.

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10. Moreover, as noted in the discussion at page 17, *supra*, the only two courts of note that *ever* at one time expressed a contrary view *prior* to 1985 have since agreed with the Fifth Circuit in this case and joined with the eight circuit courts of appeal whose previous decisions the Fifth Circuit properly followed.

II.

THE DECISIONS BELOW PROPERLY DETERMINED UNDER FAA § 4 THAT NO PARTY WAS IN DEFAULT OF A VALID ARBITRATION AGREEMENT, THAT THE PARTIES SHOULD CONTINUE TO PROCEED TO ARBITRATION IN ACCORDANCE WITH THE PARTIES' AGREEMENT TO ARBITRATE, AND THAT THERE WAS NO BASIS IN LAW OR IN FACT UNDER FAA §§ 3-4 TO JUDICIALLY ALTER THE TERMS OF THE PARTIES' AGREEMENT TO ARBITRATE.

Petitioner's alternative request, that a court be required to compel "expedited" arbitration whenever a preliminary injunction is issued, is equally without legal foundation and is also not an issue which warrants review. FAA § 4 expressly provides that a court may compel a party to arbitrate only where that party is in "default" of a valid arbitration agreement, and, where this requirement is satisfied, the court may then order arbitration to take place "*in accordance with the terms of the agreement [to arbitrate]*". The FAA's strict "default" mandate, and its requirement that arbitration be had only "in accordance with the terms of the agreement [to arbitrate]", ensures that private contractual agreements to arbitrate are enforced as written. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (FAA reflects "congressional desire to enforce private agreements into which parties had entered"). Indeed, it has long been recognized by this Court that arbitration is a matter of contract between the parties and that the terms upon which the parties agree to arbitrate must be strictly enforced. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1961). Accordingly, as FAA §§ 3-4 mandate, a court has no authority to alter, modify or otherwise order arbitration other than in accordance with the terms of the parties' arbitration agreement.

As petitioner admits, and as he was bound to concede at the district and appellate court levels, the only "agreement to arbitrate" in this case is to arbitrate "in accordance with the Constitution and Rules of the New York Stock Exchange". (*See* Petition at p. 7, n. 5, citing NYSE Arbitration Rule 347, a rule that expressly requires that all arbitration hearings before the NYSE proceed "in accordance with the provisions of this Constitution and such rules as the Board may from time to time adopt". Petitioner does not (and could not) now argue, and has never at any time argued in the proceedings below, that Merrill Lynch was in "default" of any agreement to arbitrate.[11] As a threshold matter, then, it is obvious that the district court was fully justified in not finding any such default but in instead allowing the parties to continue to proceed with arbitration in accordance with their agreement to arbitrate.

Petitioner now contends that, notwithstanding the absence of any default by Merrill Lynch to arbitrate in accordance with "the [parties'] agreement to arbitrate", and notwithstanding the district court's recognition that arbitration was proceeding "in accordance with the terms of the [parties'] agreement", the district and appellate courts should have *altered* the parties' agreement to arbitrate and ordered the parties to proceed to what petitioner has called "expedited" arbitration, a non-existent procedure under the parties' agreement to arbitrate, *i.e.*, the Constitution and Rules of the New York Stock Exchange. Neither the Constitution nor the Rules of the NYSE, however, provide for "expedited" arbitration, and petitioner has accordingly been unable to include in the district or circuit court record any reference to any NYSE rule providing for "expedited" arbitration proceedings. There is none. To the contrary, the NYSE Arbitration Rules establish detailed substantive and procedural rights that would be denied

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11. *See* footnote 2, *supra*.

if petitioner could unilaterally throw out the rules to which he agreed and substitute non-existent and undefined "expedited", "special" or "*ad hoc*" arbitration rules. As such, petitioner's request for "expedited" arbitration is completely contrary to the express terms of FAA §§ 3-4 that the arbitration process proceed "in accordance with the terms of the [parties'] agreement". *See* 9 U.S.C. §§ 3-4.[12] Petitioner' s contention that a district court should be required to condition the issuance of preliminary injunctive relief upon the alteration of the terms of the parties' agreement to arbitrate would require a court to completely ignore or rewrite Sections 3 and 4 of the FAA. Accordingly, the decision by the courts below to enforce the parties' actual agreement and to decline petitioner's demand to replace the parties' agreement with an undefined "rewritten" agreement for "expedited" arbitration was fully justified and proper under the law.

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12. Recognizing that "expedited" arbitration would require a complete rewriting of the parties' agreement to arbitrate in violation of FAA §§ 3-4, petitioner has attempted to create the specter that this case has not already been arbitrated due to the fact that it was not "expedited". While Petitioner is correct that this particular dispute has not as yet been arbitrated, it is important to note that the record is clear both at the district and appellate court levels that any delay has been the result solely of *petitioner's* own refusal to proceed to arbitration and to comply with the NYSE Constitution and Rules and not, as petitioner suggests — without any support in the record below and which is belied by his own demonstrated failure to move or allege otherwise — due to any inherent "delay" in the NYSE arbitration process itself. *See* footnote 2, *supra*. Indeed, the record is clear that, absent petitioner's own delay, this case could have been arbitrated before the NYSE many months ago. *Id.*

CONCLUSION

The issues in this proceeding have been uniformly and correctly resolved by every circuit, district and state court since 1985 and before. There exists no "split in the circuits", as petitioner contends, nor does there exist any genuine "conflict" either at the district or state court level. Rather, all of these courts have unanimously agreed upon the only conclusion consistent with the plain and unambiguous language of FAA §§ 3-4 and with the preeminent goal of Congress in enacting the FAA; that FAA § 3 preserved the equitable authority of the judiciary to ensure that the parties to an arbitration agreement receive a "meaningful arbitration of their dispute."

Accordingly, there is no reason or need for Supreme Court review and Merrill Lynch respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

GREGORY S. RUBIN
Counsel of Record
THOMAS T. LODER
CHRISTOPHER C. COSS
RUBIN & ASSOCIATES
Attorneys for Respondent

April 10, 1992

APPENDIX A — AFFIDAVIT OF WILBUR R. MONIER FILED JULY 8, 1991

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CA3-91-1312-D

FRANK C. RUSCITTO,

Plaintiff,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant.

AFFIDAVIT OF WILBUR R. MONIER

STATE OF TEXAS §
§
COUNTY OF DALLAS §

I, Wilbur R. Monier, being duly sworn according to law, do depose and say as follows:

1. I am the Resident Vice President of the branch office of Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), located in Las Colinas, Texas. I have personal knowledge of the facts set forth herein. I am competent to testify under oath. I submit this affidavit in support of Merrill Lynch's Motion for Injunctive Relief against the Plaintiff, Frank C. Ruscitto.

Appendix A

2. I am familiar with the facts and circumstances of Ruscitto's employment with and resignation from Merrill Lynch. I have reviewed Ruscitto's personnel file in its entirety and I am personally familiar with Ruscitto's Account Executive Trainee Agreement, wage records, revenue reports, client activity runs, and other documents related to his employment with Merrill Lynch. Ruscitto's Account Executive Trainee Agreement, which he signed as a condition of his employment with Merrill Lynch, and in which Ruscitto expressly agreed not to confiscate Merrill Lynch's records or to solicit Merrill Lynch's clients, is attached hereto as Exhibit "A".

3. Merrill Lynch trained Ruscitto as a financial consultant, including an intensive 14-week training session with 3 weeks at Merrill Lynch's national training facility in Princeton, New Jersey, registered Ruscitto with the New York Stock Exchange, National Association of Securities Dealers, American Stock Exchange, and various state securities commissions, compensated Ruscitto at all times during his period of training and employment with Merrill Lynch, and provided Ruscitto with the benefit of all Merrill Lynch's systems, benefits and support throughout his employment with Merrill Lynch.

4. As a result of Ruscitto's employment at Merrill Lynch, he gained access to more than 350 Merrill Lynch accounts, representing over $28 million in assets under Merrill Lynch's management. These accounts generated over $370,000 in commissions for Merrill Lynch in 1990 alone.

5. On Wednesday, July 3, 1991, Ruscitto resigned *without notice* to join a competitor firm, PaineWebber, located in Dallas. At this time, Ruscitto admitted to me that PaineWebber had paid him an upfront cash "bonus" of $120,000 in addition to a 55%

commission payout rather than approximately a 35% commission payout and an additional 10% of his first year's production for inducements totalling over $300,000.

6. I then handed Frank Ruscitto a copy of his Account Executive Trainee Agreement which contains provisions in which Frank Ruscitto agreed not to remove Merrill Lynch records or to solicit Merrill Lynch clients. I have since learned, however, from reviewing Ruscitto's affidavit in support of his lawsuit against Merrill Lynch that he did in fact send Merrill Lynch's clients a solicitation letter, complete with fully pre-prepared transfer of account forms, on the same day he resigned from Merrill Lynch. In fact, Ruscitto's mailing must have been in the process of, or already, prepared when he met with me. Moreover, Ruscitto also has admitted that he began contacting Merrill Lynch's clients before he had even resigned from Merrill Lynch and while still on the Merrill Lynch payroll with the admitted intention of moving their accounts to PaineWebber.

7. Ruscitto has admitted that he has taken copies of confidential customer holding pages and other proprietary and confidential information. In addition, Ruscitto also admitted that he took a copy of his gross commission figures. Ruscitto undoubtedly took his gross commission figures so that PaineWebber could determine the amount of the "upfront" cash bonus to pay Ruscitto, which "bonus" is directly tied to Ruscitto's commission production and the amount of commissions Ruscitto can divert to PaineWebber.

8. The records which Ruscitto has taken contain highly proprietary information including the names and addresses of Merrill Lynch's clients, and also contain highly sensitive and confidential information regarding Merrill Lynch's clients

including their financial net worths, annual incomes and investment goals. This information was entrusted to Merrill Lynch by our clients with the expectation that it would remain confidential and would not be disclosed outside of Merrill Lynch under any circumstances.

9. Ruscitto's removal of Merrill Lynch's confidential information, and his solicitation of Merrill Lynch's customers, is in direct violation of the express terms of his Merrill Lynch Account Executive Trainee Agreement. That Agreement contains Ruscitto's specific promise not to use Merrill Lynch records or information, and not to solicit the clients he serviced or whose names he learned as a Merrill Lynch employee for a period of one year following his termination of employment. (See Exhibit "A" hereto and Exhibit "A" to Merrill Lynch's Motion for an Injunction.)

10. Our office has taken all possible steps to maintain the confidentiality of Merrill Lynch's records and to ensure that this information is not disclosed outside of Merrill Lynch. Ruscitto was fully aware of and responsible for complying with Merrill Lynch's policy of confidentiality. That policy is expressly set forth in the Account Executive Trainee Agreement which Ruscitto agreed to at the very outset of, and as a condition of, his employment with Merrill Lynch. In addition, every year my office conducts a compliance review to ensure that the confidentiality of Merrill Lynch's records is maintained. In my office's compliance review, we first distribute a copy of our Compliance Outline to all of our registered employees. This Compliance Outline contains a section specifically dealing with the importance of the information provided to Merrill Lynch by our clients. (See Exhibit "B" attached hereto.) Each of the financial consultants in our office is then required to acknowledge in writing that they have read

the Compliance Outline, and that they agree to abide by its terms. In accordance with Merrill Lynch corporate policy, Ruscitto has recently signed these required acknowledgement forms.

11. Our office has implemented many other procedures to maintain the confidentiality of Merrill Lynch's records and the confidential and sensitive information entrusted to Merrill Lynch by our clients. For example, our office policy is that only the financial consultant servicing a client's account is provided with access to confidential records and information pertaining to that client. In addition, each financial consultant uses a secret computer password to gain access to any information pertaining to the Merrill Lynch clients they service and is prohibited from divulging this password to anyone. In addition, I personally review all outgoing correspondence from all of the employees in the office in order to ensure that no confidential or proprietary information is disclosed outside of Merrill Lynch. Finally, it is a condition of employment of all of the financial consultants in our office that they sign an employment agreement containing the promises made in the agreement signed by Ruscitto in the attached Exhibit "A" prohibiting them from disclosing confidential trade secret information or soliciting Merrill Lynch's clients.

12. The customers serviced at Merrill Lynch by Ruscitto were developed by Merrill Lynch at great expense and over a period of many years. The expenditures by Merrill Lynch include the cost of advertising, salaries and associated costs of management, operational and sales support staff, training program expenses, salaries, operational and compliance systems, research and development, annual registration fees, office expenses, compliance supervision, computer services and equipment, quotron machines, seminars, trade and other professional news publications and promotional events.

Appendix A

13. Nearly all of the Merrill Lynch customers Ruscitto serviced represent accounts which were made up of the following:

a. Pre-existing Merrill Lynch customers who were reassigned to Ruscitto by Merrill Lynch management when the financial consultant who previously serviced the account retired, resigned or was transferred from Merrill Lynch's Las Colinas office ("reassignments");

b. Merrill Lynch customers who walked in to Merrill Lynch and were assigned to Ruscitto by Merrill Lynch management ("walk-in customers");

c. Merrill Lynch customers who called in to Merrill Lynch and were assigned to Ruscitto by Merrill Lynch management ("call-in customers");

d. Merrill Lynch customers from Merrill Lynch sponsored seminars ("seminar customers");

e. Customers from Merrill Lynch advertisements;

f. Customers from Merrill Lynch mail lists;

g. Referrals from other Merrill Lynch accounts;

h. Customers solicited by Ruscitto on behalf of, and as a representative of, Merrill Lynch.

14. The compilation of Merrill Lynch's customer list from all of these sources represents a substantial investment of time, effort and money by Merrill Lynch.

Appendix A

15. Ruscitto's access to the identity and confidential account information of these Merrill Lynch customers, and his ability to service these Merrill Lynch accounts, was by virtue of his employment with Merrill Lynch and Merrill Lynch's goodwill and reputation in the securities industry.

16. The conduct described in Paragraphs 1 through 15 constitutes a solicitation of Merrill Lynch clients and a conversion of Merrill Lynch property. More specifically, Ruscitto has converted to his own use, and that of his new employer, PaineWebber, the confidential business property and trade secrets of Merrill Lynch.

17. In addition, by his solicitation of Merrill Lynch customers, Ruscitto has breached his fiduciary duty of loyalty to Merrill Lynch.

18. Unless Ruscitto's conduct is immediately enjoined, every other financial consultant in my office will be encouraged to engage in the same illegal activity, which would result in the decimation of our office. In fact, in just the last 3 weeks, PaineWebber's Dallas manager, Mr. Larry Tate, has paid hundreds of thousands of dollars to two Merrill Lynch employees, including Ruscitto, to induce them to breach the terms of their employment agreements, to remove confidential Merrill Lynch records, and to solicit Merrill Lynch's accounts to transfer their business to PaineWebber.

19. Ruscitto's conduct has and will continue to cause irreparable harm to Merrill Lynch, as follows:

a. Disclosure of trade secrets, customer lists, and other confidential information which is solely the property of Merrill Lynch and its clients;

Appendix A

b. Loss of confidentiality of clients' records and financial dealings, loss of confidence and trust of clients, loss of goodwill, and loss of business reputation;

c. Threat to office stability;

d. Present economic loss, which is unascertainable at this time, and future economic loss, which is presently incalculable.

s/ Wilbur R. Monier
WILBUR R. MONIER

Sworn and subscribed
before me this 8th
day of July, 1991.

s/ Andrea L. Hendricks
Notary Public

[stamped:
ANDREA L. HENDRICKS
MY COMMISSION EXPIRES
March 20, 1995]

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 1991, a true and correct copy of the above and foregoing instrument was hand-delivered to: Joe H. Staley, Jr., LOCKE PURNELL RAIN HARRELL, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201.

s/ David C. McCue
David C. McCue

Appendix A

EXHIBIT A

ACCOUNT EXECUTIVE TRAINEE AGREEMENT

In consideration of Merrill Lynch, Pierce, Fenner & Smith Incorporated and/or its affiliated companies, (hereinafter referred to as Merrill Lynch) employing me as a trainee for a sales position, and in consideration of (a) the salary to be paid me by Merrill Lynch, while I am employed by Merrill Lynch, (b) the cost of my schooling and training to be received as a member of the training school of Merrill Lynch, and (c) the compensation living allowance and other benefits to be received by me while attending the school and during the pre-school and post-school training and (d) for other good and valuable consideration it is hereby agreed that:

1. All records of Merrill Lynch, including the names and addresses of its clients, are and shall remain the property of Merrill Lynch at all times during my employment with Merrill Lynch and after termination of my employment for any reason with Merrill Lynch. None of said records nor any part of them is to be removed by me from the premises of Merrill Lynch either in original form or in duplicated or copied form, and the names, addresses, and other facts in such records are not to be transmitted verbally or in writing by me except in the ordinary course of conducting business for Merrill Lynch. All of said records or any part of them are the sole proprietary information of Merrill Lynch and shall be treated by me as confidential information of Merrill Lynch.

2. In the event of termination of my services with Merrill Lynch for any reason, I will not solicit, for a period of

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one year from the date of termination of my employment in any community or city served by the office of Merrill Lynch, or any subsidiary thereof, at which I was employed at any time, any of the clients of Merrill Lynch whom I served or whose names became known to me while in the employ of Merrill Lynch. In the event that any of the provisions contained in this paragraph and/or paragraph (1) above are violated I understand that I will be liable to Merrill Lynch for any damage caused thereby.

3. In the event that I provoke my termination or that my employment is voluntarily terminated or is terminated for cause prior to completion of two years employment from the date my application is approved for registration by the New York Stock Exchange, Inc., I agree to pay Merrill Lynch in consideration of the monies invested in and training made available to me for which Merrill Lynch will not have received full benefit, damages in the amount of Seventeen Thousand Nine Hundred Dollars ($17,900). This amount is to be reduced by Forty Five Hundred Dollars ($4,500) for each completed six month period from the date of approval of registration by the New York Stock Exchange Inc. during which completed period I am employed by Merrill Lynch. I understand that I will have no obligations under the terms of this paragraph two years after the date of approval of registration by the New York Stock Exchange, Inc. provided that I remain employed by Merrill Lynch during that period.

Appendix A

4. This agreement shall be construed, and the validity, performance and enforcement thereof shall be governed by the laws of the State of New York.

5. I understand that Merrill Lynch is relying on the representations and agreements evidenced herein and that this agreement incorporates the entire understanding between me and Merrill Lynch on the subject matter herein and may not be changed except by a writing signed by Merrill Lynch (by a duly authorized officer thereof) and myself.

s/ Frank C. Ruscitto
Account Executive Trainee

By Merrill Lynch, Pierce,
Fenner & Smith Incorporated
s/
Vice President

Appendix A

EXHIBIT B

COMPLIANCE OUTLINE

FOR
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
FINANCIAL CONSULTANTS

[IN PERTINENT PART]

March, 1990

K. *Confidential Nature of Accounts*

Clients' accounts shall be handled in a highly confidential manner. You should not discuss the affairs of any client with anyone else. Client transactions should not be discussed among employees who are not concerned with the matter.

No information or records concerning the affairs of Merrill Lynch and/or its clients may be released except to persons legally entitled to receive such. This includes confidential information requested during routine regulatory visits. When in doubt, consult the Law & Compliance Division through your RVP/RM.